



PROPOSED RULE

Rights-of-Way on Indian Land

Why does the Bureau of Indian Affairs (BIA) regulate rights-of-way across Indian land?

The Department of the Interior holds approximately 56 million acres of land in trust for Indian tribes and individual Indians. Congress has enacted laws that require the Department to approve rights-of-way across Indian lands. BIA's regulations are intended to implement its trust responsibility under those laws.

Why is this proposed rule needed?

The current regulations governing rights-of-way across Indian land were promulgated over 40 years ago and last updated over 30 years ago. As such, they are ill-suited to the modern requirements for rights-of-way and the need for faster timelines and a more transparent process for BIA approval.

What would this proposed rule do?

This proposed rule would update 25 CFR 169, Rights-of-Way on Indian Land, to streamline the process for obtaining BIA approval and ensure seamless consistency with the recently promulgated leasing regulations. The proposed rule would increase the efficiency and transparency of the BIA approval process, increase flexibility in compensation and valuations, and support landowner decisions regarding the use of their land.

What changes would this proposed rule make to the BIA approval process?

The proposed rule would change the BIA approval process for rights-of-way to:

- Eliminate requirement for applicants to obtain BIA approval to access Indian land to survey it in preparation for a right-of-way application;
- Specify the process for obtaining BIA approval of rights-of-way documents on Indian land;
- Impose time limits on BIA to act on submitted rights-of-way documents;
- Establish that BIA must approve right-of-way documents unless it finds a compelling reason not to, based on certain specified findings; and
- Clarify that BIA approvals of rights-of-way documents are effective on the date of approval, even if an administrative appeal has is filed.

What time limits would the proposed rule impose on BIA?

The proposed rule would require BIA to issue a decision on a right-of-way grant within 60 days of receiving an application and would require BIA to issue a decision on an amendment, assignment or mortgage of a right-of-way within 30 days of receiving an application. The proposed rule would also add an administrative process so that if BIA fails to meet these timelines, the applicant can elevate the matter to the BIA Regional Director, then BIA Director.

What changes would this proposed rule make to compensations and valuations?

The proposed rule would provide a different approach to compensation depending on whether the land is tribal land or individually-owned Indian land.

- *For rights-of-way on tribal land:* Compensation may be in any amount the tribe negotiates, or may be an alternative form of rental, such as in-kind consideration, and

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BUREAU OF INDIAN AFFAIRS
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BIA will not require a valuation, as long as the tribe provides documentation that the tribe has determined the compensation is in its best interest. BIA will not require a periodic review of the adequacy of the compensation for rights-of-way on tribal land.

- *For rights-of-way on individually-owned Indian land:* Compensation must be at least fair market rental unless the landowners execute a written waiver and BIA determines the waiver to be in the landowners' best interest. BIA will also require a valuation, unless all the landowners execute a written waiver or the grantee will construct infrastructure improvements on, or serving, the premises and BIA determines it is in the best interest of all landowners. In addition, if BIA determines it is in the Indian landowners' best interest, then the grant may provide for alternative forms of rental or varying types of compensation. No periodic review of the adequacy of rent or rental adjustment is required if payment is a one-time lump sum, the right-of-way duration is 5 years or less, the grant provides for automatic adjustments, or BIA determines it is in the best interest of the landowners not to require a review or automatic adjustment.

What changes would this proposed rule make to direct pay?

The proposed rule would allow for direct pay of rights-of-way where there are 10 or fewer landowners, and all landowners consent to direct pay. Direct pay would continue unless and until 100% of the owners agree to discontinue direct pay or certain circumstances occur allowing discontinuation with regard to one specific landowner.

What changes would this proposed rule make to compliance & enforcement?

The proposed rule would make the following change to compliance with and enforcement of rights-of-way:

- Restrict BIA's right of entry to reasonable times and upon reasonable notice, consistent with notice requirements under applicable tribal law and right-of-way documents;
- Provide that, in the event of a violation, BIA will defer to ongoing actions or proceedings provided for in the right-of-way grant's negotiated remedies, as appropriate;
- Provide that BIA will provide a copy of the notice of violation to the tribe for tribal land, and will provide constructive notice to Indian landowners for individually owned Indian land;
- Require BIA to consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to determine what action to take if the grantee does not cure a violation within the requisite time period.

What are some other significant changes this proposed rule would make to rights-of-way?

The proposed rule would also make the following changes:

- Eliminate outdated requirements specific to different types of rights-of-way;
- Clarify that a right-of-way grant on Indian land may include provisions requiring the grantee to give a preference to qualified tribal members, based on their political affiliation with the tribe;
- Clarify what laws and taxes apply to rights-of-way approved under 25 CFR 169;
- Add that a bond is required to be provided with the application, rather than a deposit; and
- Clarify when a BIA grant of a new right-of-way on Indian land is required or an existing right-of-way may be amended.

How can I comment on the proposed rule?

You can submit your comments to consultation@bia.gov. Comments are due by August 18, 2014. Information on tribal consultations is available at the Rights-of-Way link on <http://www.bia.gov/WhoWeAre/AS-IA/ORM/index.htm>.